

Book Reviews

CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. By Robert Wyness Millar. New York: The Law Center of New York University for The National Conference of Judicial Councils. 1952. Pp. xvi, 534. \$7.50.

Here is a procedure text which excites my wholehearted enthusiasm. Had I not known what to expect from its distinguished author, I should have been frightened by the title; it suggests a combination of two influences in procedure pedagogy—history and the broad survey—which despite their virtues nevertheless serve to kill off realistic knowledge of modern courts. But the book is what the title promises. It is present-day procedure seen in historical perspective and seen as a whole, but with the appropriate balance to avoid engulfment by either the temporal or the territorial sweep. And we are all indebted in consequence for a work which is at once scholarly and practical.

Careful study of this text impresses one the more with its range. This is not a large volume as legal texts go. Yet its scope is truly amazing. Part I is a brilliant, concise essay on procedural evolution from its early beginnings in Anglo-Saxon law and on the course of reform in both England and the United States. Part II, the larger portion of the book, deals with specific phases of the law of civil procedure; its twenty chapters range from "Conjunct Administration of Law and Equity," *i.e.*, the union of law and equity, through the commencement of suit, joinder of parties, pleading, pre-trial and discovery, trial, the jury, and the judgment, down to execution of judgments and attachments. On each of these topics the treatment is far from cut and dried. The historical analysis, while succinct, is unusually stimulating in its orientation and in the perspective it gives to the modern principles. And the detailed exposition is not merely informative—it is that to a surprising degree; it is also critical and creative. With the author's background as an historian, one could well have expected the scholastic expert's usual nostalgia for the past. But on the contrary, the book is refreshing in its call for more and greater reform. Wholly admirable is the deft and sure way in which many a pleading icon is overthrown—the formal attack on the complaint (the "demurrer"), the "facts constituting the cause of action," the limitations on summary judgment, and all the other paralyzing dogmas of the past and, unfortunately, the present. A single example: "No chapter in the history of the American codes is more conspicuous for jejune dialectic than that relating to the present matter [the exclusion of inconsistent defenses]" (p. 181).

It is impossible in a short review to convey adequately the flavor of this skillful blending of the past and present with an eye on the future. Since his critique of the latest and most modern systems is especially intriguing, I shall discuss that as a means of savoring the whole. Worthy of note is the fact that the author has studied the original drafts for the Federal Rules, and in several instances expresses regret that these, or suggestions in them, did not prevail. They include such matters as the manner of instituting suit and the service of process and the original form of the rule for amendments to conform to the proof. Since I worked through all this and in general sympathize with the author's views and criticisms, I cannot avoid some melancholy thoughts of what might have been. But reflection tells me that this is not the entire story.

The goal of mythical perfection had to be tempered to minimize the strong resentment of lawyers who were not prepared for so extensive a change. Certain compromises were desirable to promote both the spirit and the fact of uniformity. In retrospect I do not think those were great or too high a price to pay for the very wide support the rules have had. This aspect I think the author has overlooked—perhaps intentionally—in his call for greater accomplishment. A view to further progress is certainly desirable despite—or possibly even to counterbalance—occasional retrogressive attacks on the rules, well illustrated by the recent Pacific Coast plea for a return to alleging the facts of the cause of action.¹

This particular issue might receive a bit more of our attention, since the author's critique of the present rule's caution well illustrates the point I would make. The rules represent essentially a middle position based on the best common-law precedents steadily in use in the more moderate and successful code states.² What the Western lawyers want is none too clear; they rather seem to have been influenced by some indiscriminate criticisms looking to the stricter procedure of only a few states and even there not consistently applied.³ But their clamor does illustrate the shock of lawyers at what is feared, no matter how erroneously, to be new. One can imagine their horror at the author's reasoned and fairly persuasive conclusion (p. 193) that "[t]he solution, we think, is to be found in the frank and unqualified acceptance . . . of the principle that, so far as regards the statement of facts, no more should be asked of a pleading than that it give adequate notice of the claim or defense." While I can see nothing but confusion in the Western proposal, I still do think there is much to be said for the fair compromise of the rules. The present rule is in line with traditional habits of most well-informed lawyers and has thus proved its practicability; the pleading it envisages does give a considerable amount of valuable information for the case itself, for selection of the mode of trial, and for recognition and enforcement of the principle of *res judicata*; and the rule's comparative leniency avoids undue burdens and waste.⁴ These advantages are to be weighed against the complete indefiniteness of the seemingly attractive

1. The Ninth Circuit Judicial Conference has proposed as an amendment to the provision of FED. R. CIV. P. 8(a) that the complaint shall contain "a short and plain statement of the claim showing that the plaintiff is entitled to relief" the further words "which statement shall contain the facts constituting the cause of action." REP. JUDICIAL CONF. OF THE U. S. 23 (Sept. 22-24, 1952). I have discussed this proposition somewhat more fully in my forthcoming review of VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION (1952), in 62 YALE L. J. (1953).

2. So Federal Form 9, "Complaint for Negligence," was taken from the Massachusetts statute, MASS. GEN. LAWS c. 231, §147, p. 2892 (1932), and is the common-law declaration in trespass on the case. *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (C. P. 1833); *Reichwein v. United Electric Rys. Co.*, 68 R.I. 365, 27 A.2d 845 (1942). See also Federal Forms 4-8 and the "common counts"; Cook, "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 233, 245 (1937); Notes, 30 CALIF. L. REV. 585 (1942), and 4 *id.* 352 (1916); CLARK, CODE PLEADING 287-296 (2d ed. 1947).

3. See *e.g.*, *City of Logansport v. Kihm*, 159 Ind. 68, 64 N.E. 595 (1902); *Frosch v. Sears, Roebuck & Co.*, 124 Conn. 300, 199 Atl. 646 (1938); *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 28 N.E.2d 846 (1940); see also CLARK, CASES ON MODERN PLEADING cc. 2, 3 (1952).

4. See general discussion in CLARK, CODE PLEADING 225-245 (2d ed. 1947); Clark, *Simplified Pleading*, A.B.A. JUD. ADM. MONOGRAPHS (Ser. A, No. 18), also reprinted in 2 F.R.D. 456, 27 IOWA L. REV. 272 (1942), and 1942 HANDBOOK NAT. CONF. JUD. COUNCILS 136; see also the review in 62 YALE L. J., note 1 *supra*.

admonition of mere "notice." Even the author's objective in supporting (pp. 195-200) a proposal by a City Bar Committee in New York for "a single statement of the transaction or facts, followed by a statement of the various legal theories upon which he claims to be entitled to recover under those facts," seems more substantially, if more traditionally, achieved in the formula of the rules.

In this connection the author's condemnation of the demurrer—whose return in some form would be a necessary concomitant to any real retreat to "the facts" of the "cause of action"—while wholly admirable, does not, I think, necessarily point to the superiority of the English Rules over American counterparts. Here, too, the Federal Rules had to go slowly, and to take some note of professional nostalgias. And particularly by virtue of the amendments of 1948, the difference in the procedures is now rather small. Notable among the recent changes was the amendment of Rule 12(b) turning the former motion to dismiss on the pleadings into a motion for summary judgment on the merits at the desire of any party unless affirmatively checked—as it is not in practice—by the trial judge. This revised rule seems to be working quite along the lines the author urges.⁵ We are grateful for his clear-sighted perception of the course that improvement should take.

What I have said on this one interesting point conveys, I hope, something of the width of view, the background of experience and history, which the author brings to his task. The discussion here given emphasis is, after all, only a dozen or so pages—a slight part of the total, and yet a complete unit in itself. Other examples could be multiplied. But this affords an illustration of the economy with which the author treats a confusing and ordinarily compartmentalized subject. And there is good writing; last but by no means least, the book is interesting to read.

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MONOPOLY AND FREE ENTERPRISE. By George W. Stocking and Myron W. Watkins. New York: Twentieth Century Fund. 1951. Pp. xv, 596. \$4.00.

The plan of the Twentieth Century Fund's impressive survey, *Monopoly and Free Enterprise*, follows the pattern of many congressional committee reports. The bulk of the work was written by the research staff, headed by George W. Stocking and Myron W. Watkins. Their findings (Chs. 1-15) provide a background for the Report and Recommendations of the Fund's Committee on Cartels and Monopoly (Ch. 16).¹ In view of the fact that the chairman and three other members of the Committee have annotated the report with occasional notes of individual disagreement, it is fair to surmise that the synthesis of the Committee's views was also prepared by the staff.

To appraise a committee report fairly, it is necessary to know something about the record on which the report is based—what witnesses were

5. See cases cited in CLARK, *CASES ON MODERN PLEADING* 400-404 (1952), and Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, in *FEDERAL RULES OF CIVIL PROCEDURE AND NEW TITLE 28, U. S. CODE JUDICIARY AND JUDICIAL PROCEDURE* 1, 6, 14, 24 (West Pub. Co., rev. ed. 1952).

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1. The Committee included the following members: James M. Landis (Chairman), A. S. Goss, Marion Hedges, Donald M. Nelson, Frank M. Surface, Jacob Viner, and J. Raymond Walsh.